MODERATING THE USE OF LAY OPINION IDENTIFICATION TESTIMONY RELATED TO SURVEILLANCE VIDEO

GEORGE BACH*

ABSTRACT

Traditionally, under the "silent witness" theory, when video surveillance recordings are authenticated and admitted at trial, the video "speaks for itself." However, with increasing frequency, courts have permitted witnesses to provide lay opinion identification testimony about individuals in the surveillance video. The testimony is offered as lay opinion testimony that assists the jury, particularly in cases where the video is of poor quality, the subject's face is difficult to see, or the subject's appearance has changed by the time of trial. Recent state court opinions (including several state supreme courts as a matter of first impression) have upheld the admission of lay opinion identification testimony in an overly lenient manner that should be addressed. The primary problem with this kind of lay opinion testimony is that it poses challenges to effective cross-examination, particularly in criminal cases in which the witness is a law enforcement officer. Cross-examination that attempts to test the officer's testimony may be ineffective or, worse, harmful, to the extent that it attempts to explore the officer's familiarity with a criminal defendant. Courts have developed some procedural safeguards to protect against abuse of this form of testimony, but they are insufficient and fail to ensure effective cross-examination in all circumstances. This Article proposes additional safeguards that courts can use to moderate the use of lay opinion identification testimony related to surveillance video, while permitting such testimony when it is helpful to the jury in determining an issue of fact.

* Associate Professor of Law, University of New Mexico School of Law. Many thanks to Hon. William P. Lynch, Dean Sergio Pareja, Vice-Dean Camille Carey, Associate Dean Nathalie Martin, Professors Joshua Kastenberg, Ernesto Longa, Ted Occhialino, Dawinder "Dave" S. Sidhu, Kyle C. Velte, attorneys Maureen A. Sanders and Yvonne Zylan, my outstanding research assistant, David Link, and the editors of the Florida State University Law Review.

I. INTRODUCTION

Traditionally, under the "silent witness" theory[1], when video-surveillance recordings are authenticated and admitted at trial, the video "speaks for itself."[2] However, with increasing frequency, courts have permitted witnesses to provide lay opinion identification testimony about individuals in the surveillance video. Imagine that surveillance footage that captures a defendant is admitted at trial, and rather than allowing the jury to assess whether the footage is that of the defendant, the court permits an officer—*who was not present*—to testify that the individual in the video is the defendant. The testimony is offered pursuant to Federal Rule of Evidence 701 (or a state analog) as lay opinion testimony that assists the jury,

1. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 216, at 39 (7th ed. 2013).

2. *See, e.g.*, State v. Dunn, 246 S.E.2d 245, 250 (W.V. 1978) (describing the silent witness theory in which a photo "speaks for itself").

particularly in cases where the video is of poor quality, the subject's face is difficult to see, or the subject's appearance has changed by the time of trial. For instance, a witness may testify that he or she recognizes a person in the video because the witness is familiar with their build or gait.[3] More widespread use of surveillance technology appears to have led to renewed attention to the issue.[4] Recent state court opinions (including several state supreme courts as a matter of first impression) have upheld the admission of lay opinion identification testimony in an overly lenient manner that should be addressed.[5]

The primary problem with this kind of lay opinion testimony is that it poses challenges to effective cross-examination, particularly in criminal cases in which the witness is a law enforcement officer. Cross-examination that attempts to test the officer's testimony may be ineffective or, worse, harmful, to the extent that it attempts to explore the officer's familiarity with a criminal defendant. Consider this question on cross: "You claim that you can recognize the defendant in that grainy video?" with this hypothetical answer: "Yes, I have arrested him a dozen times and know him when I see him." Cross-examination break downs entirely—the questions are not "how close were you to the suspect?" or "how dark was it?" but rather, "how do you know that was the defendant even though you were not there?"

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3. *See*, *e.g.*, Glenn v. State, 806 S.E.2d 564, 569 (Ga. 2017) ("[I]n most cases, the opportunity to observe a person's mannerisms, gait, and similar characteristics depicted in video footage will increase the likelihood that a lay witness familiar with a defendant will be better equipped than jurors to identify the defendant from such images").

4. *See* MARK SCHLOSBERG AND NICOLE A. OZER, UNDER THE WATCHFUL EYE: THE PROLIFERATION OF VIDEO SURVEILLANCE SYSTEMS IN CALIFORNIA 16 (Aug. 2007), https://aclunc.org/sites/default/files/under_the_watchful_eye_the_proliferation_of_video_surveillance_systems_in_california_0.pdf [https://perma.cc/4YJE-XMJF] ("Most of the surveillance camera systems in California were installed in the last few years. Seven of the [ten] most extensive systems in Northern and Central California were installed in the last four years."); I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 961–62 (2013) ("[In] 2006, there were nearly 4,200 public and private surveillance cameras in lower Manhattan alone, a five-fold increase from 1998. By 2010, the number had increased such that if you were in a public space in lower Manhattan, the odds would be 'pretty good' that you were being watched." (footnote omitted)).

5. *See*, *e.g.*, People v. Thompson, 49 N.E.3d 393 (Ill. 2016) *reh'g denied*; State v. Sweat, 404 P.3d 20 (N.M. Ct. App. 2017); Glenn v. State, 806 S.E.2d 564 (Ga. 2017); Lenoir v. State, 222 So. 3d 273 (Miss. 2017); State v. Weldon, 811 S.E. 2d. 683 (N.C. Ct. App. 2018); State v. Custis, No. A-5132-15T2, 2018 WL 6712368, at *7–8, *15–17, *21 (N.J. Super. Ct. App. Div. Dec. 21, 2018). Researching back to the year 2000, Professor Ernesto Longa has found that, beginning in 2014–15 to date, the annual average of state cases discussing lay opinion identification testimony related to surveillance video has increased to more than double the number from the preceding three years, and more than triple the annual number of cases discussing it in the years before 2010–11. E-mail from Ernest Longa, Professor of Law Librarianship, The University of New Mexico School of Law, to author (June 3, 2019, 10:57 MDT) (on file with author).

In response, courts have developed some procedural safeguards to protect against abuse of this form of testimony, [6] but they are insufficient. The Illinois Supreme Court recently articulated guiding factors in a comprehensive opinion, *People v. Thompson*,[7] but they are not sufficient to ensure effective cross-examination in all circumstances. Accordingly, additional limits are needed to ensure that the use of lay opinion identification testimony does not undermine this basic trial right or the integrity of the trial as a whole.

Scholars have discussed the issue in the context of Federal Rule of Evidence 701 lay opinion testimony more broadly,[8] but in doing so have proposed a restrictive approach that is too limiting and overly infringes on the ability to use this evidence when it is helpful to the jury. This Article proposes additional safeguards that courts can use to moderate the use of lay opinion identification testimony related to surveillance video, while permitting such testimony when it is helpful to the jury in determining an issue of fact. In particular, I argue that courts should: a) permit law enforcement witnesses to provide the opinion only when there is no alternative evidence; b) prohibit testimony on the nature of the witness's relationship to a party when it is unfairly prejudicial; c) limit the number of law enforcement personnel who provide lay opinion identification testimony; d) instruct the jury that the witness's testimony is just an opinion and that it should consider the witness's relationship to the proffering party; and e) require that the witness acquire their familiarity with the subject of the video prior to the litigation.

In Part II, this Article discusses the requirement of authenticating the surveillance video itself to admit it at trial. In Part III, it examines the history and reasoning behind the liberalization of the opinion rule now codified in Rule 701. In Part IV, the judicial approaches to lay opinion testimony identifying individuals in surveillance video are reviewed. In Part V, additional factors are proposed that moderate the use of lay opinion testimony in this context, and in Part VI, the Article concludes by explaining that these factors will better balance the need for the testimony against the harm to individual parties, particularly criminal defendants. This Article adds to current literature by exploring a more nuanced, and thus more useful, approach to the use of lay testimony related to video

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6. *See*, *e.g.*, *Thompson*, 49 N.E.3d at 403–05.

7. *Id*.

8. *See generally* Kim Channick, Note, *You Must be this Qualified to Offer an Opinion: Permitting Law Enforcement Officers to Testify as Laypersons under Federal Rule of Evidence 701*, 81 FORDHAM L. REV. 3439 (2013); Kristine Osentoski, Note, *Out of Bounds: Why Federal Rule of Evidence 701 Lay Opinion Testimony Needs to be Restricted to Testimony Based on Personal First-Hand Perception*, 2014 U. ILL. L. REV. 1999 (2014).

surveillance evidence. Moreover, courts have resisted arguments for banning the use of lay opinion testimony relevant to video surveillance, evincing the broader purpose that this Article may serve. The suggestions posited in this Article reflect a compromise and if followed, will result in a fairer use of such testimony.

II. THE ADMISSION OF VIDEO-SURVEILLANCE RECORDINGS

Video-surveillance recordings may be relevant in criminal or civil cases. Typically, they are offered by the prosecution against a criminal defendant.[9] The prosecution offers the video to prove the defendant committed the charge illegal act. The images themselves are generally admissible, if relevant and properly authenticated.[10]

The first evidentiary step at trial is establishing the admissibility of the video recording. Often, video-surveillance footage offered at trial is admitted under the "silent witness" theory.[11] The video camera recorded the incident and it becomes the "witness" to the incident when the video is played back in court. "Courts acknowledge that these videotapes are independent sources of substantive evidence; indeed, they seem to treat these tapes as unimpeachable eyewitnesses 'testifying' to the true version of what happened."[12]

In order for the video to be played in court, it must be authenticated.[13] Videos may be authenticated by the testimony of a person who witnessed the events recorded[14] or by demonstrating that it is the "[e]vidence describing a process or system and showing that it produces an accurate result."[15] While authenticity is generally

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9. *See*, *e.g.*, the cases discussed in Part IV.

10. Statements made in the recordings, if offered for the truth of the matter asserted in them, would only be admissible after a hearsay analysis. FED. R. EVID. 801, 802.

11. United States v. Marshall, 332 F.3d 254, 263 n.5 (4th Cir. 2003) ("The district court did not abuse its discretion in admitting videotaped footage under a 'silent witness' theory . . . because the Government introduced sufficient evidence establishing the reliability of the footage."); State v. Sweat, 404 P.3d 20, 26 (N.M. Ct. App. 2017) (citing State v. Imperial 392 P.3d 658 (N.M. Ct. App. 2017), cert. denied and State v. Henderson, 669 P.2d 736 (N.M. Ct. App. 1983)).

12. BROUN ET AL., *supra* note 1, § 216, at 40.

13. To be properly authenticated in federal court, the judge must decide whether a reasonable jury could conclude that the evidence is what the proponent claims. *See* FED. R. EVID. 901 advisory committee's note to 1972 proposed rules ("This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).")

14. FED. R. EVID. 901(b)(1).

15. FED. R. EVID. 901(b)(9)*; see*, *e.g.*, Standmire v. State, 475 S.W.3d 336, 344 (Tex. Ct. App. 2014) ("Reliability of the system or process is most often used when there is no witness that was present at the scene or event depicted in the photograph or video. This is common with security videos; such as those used after hours in convenience stores and freestanding automatic teller machines."). *See generally* BROUN ET AL., *supra* note 1, § 216.

a low bar to overcome, steps must be taken to establish that the video is what the proponent claims. This is of particular import because the video becomes the "witness" and the "witness's" testimony must be relevant.

Once the video is properly authenticated and admitted, the video should "speak for itself."[16] That is, the video plays and the jurors can view it, draw their own conclusions, and give the recording the weight that is due.

What courts are permitting even more frequently today is lay opinion testimony that identifies an individual in the surveillance video, once it is admitted.[17] The witness who testifies to that effect was not present at–and did not witness–the incident that was recorded.[18] Rather, the witness testifies based on his or her familiarity with the individual who was purportedly recorded.[19] The witness states his or her opinion as to the identity of the individual pictured in the video.[20] That form of testimony, lay opinion testimony, is analyzed under Federal Rule of Evidence 701.[21]

III. HISTORY AND REASONING BEHIND RULE 701

A. The Rule

A trial court has broad discretion in deciding whether to admit lay opinion testimony.[22] When a person is called to testify about the identity of an individual in a surveillance video, they are testifying as to their opinion of who that individual is. Fed. R. Evid. 701 permits lay opinion testimony in the follow circumstances:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
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> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

16. *See supra* note 2.

17. See cases discussed in Part IV.

18. *Contra* United States v. Shabazz, 564 F.3d 280, 287 (3d Cir. 2009) ("Patton identified Shabazz in images taken from a surveillance video of events *in which Patton himself took part*. Indeed, the District Court expressly limited Patton's narration of the video to those incidents to which Patton was an eyewitness . . . .").

19. *See, e.g.*, People v. Thompson, 49 N.E.3d 393, 398–400 (Ill. 2016) *reh'g denied*.

20. *Id.*

21. *Id.* at 402.

22. 4 MARK S. BRODIN, ET AL., WEINSTEIN's FEDERAL EVIDENCE § 701.06 (2d ed. 2019).

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.[23]

In its "purest form," lay opinion testimony is just a "shorthand rendition" of the facts that a witness observed.[24] The classic example of proper lay opinion testimony by a witness is testimony that someone appeared intoxicated: "He looked drunk to me."[25] Provided that the proper foundation has been laid, such testimony is "rationally based on the witness's perception."[26] The advisory committee note to the 1972 Proposed Rule 701 explained that "[l]imitation (a) is the familiar requirement of first-hand knowledge or observation."[27] Such testimony, providing a short-hand rendition of the facts, is also "helpful" to the jury–because it makes it easier for a witness to describe what they saw (as opposed to having them awkwardly describe specific movements or speech patterns) and because the jury was not there or in a position to have seen the allegedly intoxicated person themselves.[28]

The same rational basis requirement applies to lay opinion identification testimony.[29] In order for a witness to offer lay opinion testimony that they recognize an individual in a video surveillance recording, the witness must first establish that they have sufficient familiarity with that individual.[30] "[A] witness's ability to render a lay opinion making a photographic identification . . . depends on

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23. FED. R. EVID. 701.

24. BRODIN ET AL., *supra* note 22, § 701.03[1]. "In the 18th century, 'no one thought of questioning the opinions, conclusions, or inferences of the ordinary or lay witness when he came properly equipped with a basis of "facts," of personal observation.' " *Id*. (quoting JOHN HENRY WIGMORE, 7 EVIDENCE IN TRIALS AT COMMON LAW § 1917, at 5 (James H. Chadbourn rev. 1978)).

25. *See* United States v. Mastberg, 503 F.2d 465, 470 (9th Cir. 1974) ("[U]nder the modern, and probably majority, view a lay witness may state his opinion that a person appeared nervous or intoxicated."); *see also* WIGMORE, *supra* note 24, § 1974 (Chadbourn rev. 1978) (discussing opinions on "sundry topics," "[c]orporeal appearances of persons and things ('looking' sad, ill, and the like; intoxication, age, etc.")); FED. R. EVID. 701 advisory committee's note to 2000 amendment (noting that the amendment was "not intended to affect the 'prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences,' " quoting Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1196 (3d Cir. 1995)).

26. FED. R. EVID. 701(a).

27. FED. R. EVID. 701 advisory committee's note to 1972 amendment.

28. *See* United States v. Horn, 185 F. Supp. 2d 530, 560 (D. Md. 2002) (noting "near universal agreement that lay opinion testimony about whether someone was intoxicated is admissible" if it satisfies the elements of Rule 701).

29. *See e.g.*, *Thompson*, 49 N.E.3d at 402.

30. *Id*. at 403.

the sufficiency of the witness's prior exposure to the subject matter of the testimony."[31] Without that, there is not a "rational basis" for the opinion.[32]

Lay opinion testimony also cannot encroach into an area exclusive to experts as regulated under Rule 702, that is, testimony "based on scientific, technical, or other specialized knowledge."[33] The focus of this Article is *lay* opinion testimony that identifies a person in video-surveillance recordings, not *expert* testimony that might involve technical knowledge to assist with the identification of an individual in a video.[34]

B. Rule 701's Drafters Liberalized Use of Lay Opinion, Believing Effective Cross-Examination Would Keep It in Check

Rule 701 was codified, in part, to jettison formalistic distinctions between "fact" and "opinion" testimony.[35] But it is critical to understand why the drafters were willing to rid the courts of such a distinction. The reasoning illustrates why, today, courts should be cautious in permitting use of lay opinion testimony regarding the

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31. BRODIN, ET AL., *supra* note 22, § 701.03[2].

32. *Id*. Despite the "rational basis" requirement, this testimony is still "eyewitness identification" testimony of a sort that scholars have criticized more generally. *See* Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: and Empirical Analysis of Eyewitness Identification Reform Strategie*s, 81 MO. L. REV. 377, 379 (2016); Nicholas A. Kahn-Gogel, Manson *and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L.L. REV. 175, 178 (2012).

33. FED. R. EVID. 701(c).

34. *See*, *e.g.*, United States v. Cairns, 434 F.2d 643, 644 (9th Cir. 1970) ("[A] special agent with the Federal Bureau of Investigation and photographic identification specialist, compared two photographs: a photograph taken by the bank's surveillance camera at the time of the robbery and a police photograph of appellant taken ten days prior to trial."); Mohammed Osman & Edward Imwinkelried, *Facial Recognition Systems*, 50 CRIM. L. BULL. § 1 (2014); Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1051–52 (2006); John Nawara, *Machine Learning: Face Recognition Technology Evidence in Criminal Trials*, 49 U. LOUISVILLE L. REV. 601, 620 (2011); Julie Bosman & Serge F. Kovaleski, *Police See Promise of Facial Recognition Tools*, N.Y. TIMES, May 18, 2019, at A4. For a thorough discussion of the distinction between lay and expert opinion, see BRODIN ET AL., *supra* note 22, § 701.03[4][a]. *See also* THOMAS A. MAUET AND WARREN D. WOLFSON, TRIAL EVIDENCE § 4.7 (6th ed. 2018), Personal knowledge and opinions (FRE 602, 701) noting:

> For example, a police officer can describe the defendant's "suspicious" behavior observed at the site of a drug deal without being qualified as an expert. But he will have to survive an FRE 702 qualification and reliability determination before he uses his specialized knowledge to explain the defendant's use of code words to describe drug quantities and prices or to testify that the defendant's conduct was consistent with that of a drug trafficker.

35. FED. R. EVID. 701, advisory committee's note to 1972 amendment. "Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion." *Id*.

identification of individuals in video-surveillance recordings. That is, inherent in the more permissive approach to lay opinion testimony is a belief that cross-examination could address any problems in such testimony.

> The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.[36]

Other scholars have commented on the problems with the liberalization of lay opinion testimony. Kim Channick and Kristine Osentoski set forth an extensive background on Rule 701 in their respective notes.[37] Although not focusing on lay opinion identification testimony, they each recommend a fairly restrictive approach to the use of lay opinion testimony generally. Channick and Osentoski suggest that a law enforcement witness should only be permitted to testify about events that the witness personally participated in or contemporaneously observed.[38] That is too restrictive and prohibits helpful testimony; the admission of the testimony should not turn on whether the witnesses actually witnessed the events set forth in the video, provided the other requirements of 701 are satisfied.

Channick surveys the three principle circuit approaches to such testimony: that of the Tenth and Eleventh Circuits, which allow law enforcement testimony without requiring personal perception of the actual events;[39] the Seventh and Ninth Circuits, which allow testimony including "after-the-fact" knowledge to be combined with

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36. *Id*. (citations omitted)*; see also* BRODIN ET AL., *supra* note 22, § 701.02 ("[C]ounsel for the opponent can be relied on to reveal any weaknesses in the opinion testimony through cross-examination or argument.") (citing the FED. R. EVID. 701, advisory committee's note to 1972 amendment.).

37. Kim Channick, Note, *You Must be this Qualified to Offer an Opinion: Permitting Law Enforcement Officers to Testify as Laypersons under Federal Rule of Evidence 701*, 81 FORDHAM L. REV. 3439 (2013); Kristine Osentoski, Note, *Out of Bounds: Why Federal Rule of Evidence 701 Lay Opinion Testimony Needs to be Restricted to Testimony Based on Personal First-Hand Perception*, 2014 U. ILL. L. REV. 1999.

38. Osentoski, *supra* note 37, at 2044; Channick, *supra* note 37, at 3477.

39. Channick*, supra* note 37, at 3458.

related first-hand knowledge;[40] and the Second, Fourth and Eighth, which requires observation or participation (the approach Channick endorses).[41]

Osentoski bases part of her argument on the requirement that a witness have personal knowledge.[42] She is correct that Rule 701 incorporates the personal knowledge requirement of Rule 602.[43]

> One of the earliest and most pervasive manifestations of the common law insistence is the rule that a witness testifying about a fact which can be perceived by the senses must (1) have had an opportunity to observe, (2) have actually observed the fact, and (3) presently recall the observed fact.[44]

The personal knowledge requirement should inform a court's decision on whether to admit lay opinion testimony, as discussed below. That said, while the restrictive approach proposed by Channick and Osentoski would absolutely address the concerns raised about lay opinion identification testimony, the majority of courts have rejected a conservative approach to the testimony. Courts have ruled this way, in part, because such an approach is not unlike the more formalistic opinion rule that has "roots in medieval law," which courts have significantly cast doubts on the efficiency of.[45]

Such a restrictive approach to lay opinion was rejected "because its basic assumption is an illusion."[46] "[T]he distinction between statements of fact and opinion is, at best, one of degree."[47]

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40. *Id.* at 3463.

41. *Id.* at 3465.

42. Osentoski, *supra* note 37, at 2006.

43. The rule provides:

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

FED. R. EVID. 602*; see* BRODIN ET AL., *supra* note 22, § 701.03[1].

44. BROUN ET AL, *supra* note 1, § 10, at 61.

45. *Id.* § 11 at 67 ("The early courts demanded that witnesses testify about only 'what they see and hear.'"). *See also*, WIGMORE, *supra* note 24, § 1917 (Chadbourn rev. 1978) (discussing the extensive history and general principles behind the opinion rule).

46. BROUN ET AL., *supra* note 1, § 11, at 68.

47. *Id.* (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 168 (1988)). In Rainey, the Court examined and interpreted Fed. R. Evid. 803(8) regarding the admissibility of public records. specifically the hearsay exception for public records. *Rainey*, 488 U.S. at 156. The question in Rainey focused on whether *only* factual findings from an investigation were admissible or, alternatively, whether opinions in the report could be admitted as well. *Id.* at 154. The Court rejected the bright-line approach between fact and opinion. *Id.* at 168. Again, this supports the proposition that lay testimony concerning the identification of an individual in a surveillance video should not solely turn on such a distinction. *See also*,

> Drawings, maps, photographs, and even motion pictures are only remote, partial portrayals of those "facts." . . . No matter how seemingly specific, detailed, and "factual" it is, any conceivable statement is in some measure the product of inference as well as observation and memory.[48]

Under the modern view, "[t]his shift in emphasis is in accord with the liberalization of other rules of evidence which had previously operated to deprive the trier of relevant evidence."[49] Professor Wigmore took an extremely liberal view of the admissibility of lay opinion testimony, that such opinions "should be rejected only when they are superfluous in the sense that they will be of no value to the jury."[50] Indeed, as Judge Weinstein explains, Wigmore advocated to abolish the distinction altogether.[51] "[T]he inference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data, the existence and quality of which we can always bring out, if desirable, on cross-examination."[52] Similarly, Judge Learned Hand believed that weaknesses in opinion evidence "may generally be as conveniently left to cross-examination."[53]

Wigmore's position even included more permissive use of lay opinions on identity. "The opinion rule has been used as a bludgeon . . . even against such simple statements as estimates of . . . *identity*

WIGMORE, *supra* note 24, § 1919 ("In the first place, no such distinction is scientifically possible.").

48. BROUN ET AL., *supra* note 1, § 11, at 68.

49. 3 JACK B. WEINSTEIN, ET AL., WEINSTEIN'S EVIDENCE § 701.01 (Matthew Bender 1996).

50. BROUN ET AL., *supra* note 1, § 11, at 72 (citing WIGMORE, *supra* note 24, § 1918).

51. WEINSTEIN ET AL., *supra* note 49, § 701.01; *see also*, WIGMORE, *supra* note 24, § 1929, at 39 ("The opinion rule day by day exhibits its unpractical subtlety and its useless refinement of logic. Under this rule we accomplish little by enforcing it, and we should do no harm if we dispensed with it.").

52. WEINSTEIN ET AL., *supra* note 49, § 701.01 (quoting WIGMORE, *supra* note 24, § 1929, at 39)*; see also*, WIGMORE, *supra* note 24, § 1920. Wigmore also rejected the notion that opinions might usurp the function of the jury:

> In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric. There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to "usurp" the jury's function; nor could if he desired. He is *not* attempting it, because his error (if it were one) consists merely in offering to the jury a piece of testimony which ought not to go there; and he *could not* usurp it if he would, because the jury may still reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness' opinion against their own.

Id. § 1920, at 39–40 (footnote omitted).

53. WIGMORE, *supra* note 24, § 1929, at 39 (quoting Central R.R. v. Monahan, 11 F.2d 212 (2d Cir. 1926)).

. . . ."[54] That said, Wigmore believed that opinion testimony could be excluded because of "undue personal weight."[55] The key to protecting the integrity of the truth seeking process in Wigmore's liberal approach to admission of lay opinion testimony was effective cross-examination.[56] Accordingly, even Wigmore supported the proposition that courts should, at times, exclude lay opinion identification testimony.

Professor McCormick expressed concerns about the excessive liberalization of the opinion rule and its reliance on cross-examination: "The impression from the general description or inference has already been made by the examination. Moreover, every careful trial lawyer is slow to cross-examine unless he has reason to hope for helpful answers, which he seldom does."[57] Said another way, the damage is done once the "opinion" is announced and thus cross-examining on it will be challenging. This is the primary concern that arises with use of lay opinion testimony: keeping it in check with effective cross-examination, which is only effective if it is not undermined by the risk of unfair prejudice.[58] As the Eleventh Circuit stated:

> Identification testimony from law enforcement or corrections personnel may increase the possibility of prejudice to the defendant either by highlighting the defendant's prior contact with the criminal justice system, if the witness's occupation is revealed to the jury, or by effectively constraining defense counsel's ability to undermine the basis for the witness's identification on cross-examination, if the witness's occupation is to remain concealed.[59]

Concern about effective cross-examination can arise even when the identification witness is not a law enforcement officer.[60] For

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54. *Id.* § 1977; s*ee also* WEINSTEIN ET AL., *supra* note 49, § 701.01. In discussing that a witness may express an opinion provided that it is helpful to the jury, Judge Weinstein noted that a "common example is the admission of identification testimony with respect to a person depicted in a bank surveillance photograph." *Id.*

55. WIGMORE, *supra* note 24, § 1929, at 41.

56. *Id.*

57. WEINSTEIN ET AL., *supra* note 49, § 701.02 (quoting MCCORMICK, EVIDENCE § 11(1954)).

58. United States v. Stormer, 938 F.2d 759, 760 (7th Cir. 1991) ("Stormer maintains that he was not able to effectively cross-examine the police officer witnesses to expose their bias because to do so would have had the disastrous effect of revealing the allegations of improprieties leveled against him while he was a police officer.").

59. United States v. Pierce, 136 F.3d 770, 776 (11th Cir. 1998). The court in *Pierce* "caution[ed] trial courts to admit this kind of identification testimony only in limited and necessary circumstances with all appropriate safeguards." *Id.*

60. *See* United States v. Borrelli, 621 F.2d 1092, 1095 (10th Cir. 1980) ("Borrelli argues that the admission of his stepfather's testimony regarding Borrelli's resemblance to the subject of the bank surveillance photograph invaded the province of the jury."); United States v. Young Buffalo, 591 F.2d 506, 513 (9th Cir. 1979) (permitting defendant's estranged wife to

example, in United States v. Jackman, the defendant was charged with a specific bank robbery.[61] Witnesses (including an ex-wife) familiar with Jackman were shown photos from surveillance of the bank robbery at issue [62] During the investigation and prior to identifying Jackman as the man in the charged robbery photos, all three witnesses viewed a much clearer photograph of him from a different robbery taken during the course of that robbery; the witnesses identified the robber in those photographs as Jackman.[63] It was virtually impossible to cross-examine the witnesses about this without unfairly prejudicing Jackman. Jackman argued "he could not inquire about the effect the witnesses' viewing" of the other robbery photograph had on their subsequent identification of him in the photographs from the charged robbery.[64] The First Circuit rejected the argument that Jackman was unable to engage in effective cross-examination, holding that "Jackman's failure to cross-examine these witnesses on this issue was not ordained by the court, but was instead a tactical decision."[65]

Thus Jackman, as with other individuals who must decide whether to cross-examine a witness familiar with their criminal past, are stuck between what "amounts to a choice 'between the rock and the whirlpool.'"[66] The permissive approach to lay opinion testimony under Rule 701 remains, yet the historical check on it–effective cross-examination–is not existent in these cases, not because of "tactical decision,"[67] but because there is no real choice.

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view bank surveillance photographs of the robber and to give her opinion about defendant's resemblance to the robber).

61. United States v. Jackman, 48 F.3d 1, 2 (1st Cir. 1995).

62. *Id*. at 2.

63. *Id*.

64. Jackman noted that the court had properly excluded evidence of the other robbery as unfairly prejudicial. *Id*. at 6. For a similar line of argument, see United States v. Robinson, 804 F.2d 280, 282 (4th Cir. 1986) ("Appellant further contended that he could not effectively cross examine Sylvester Robinson for fear of bringing out his prior record.").

65. *Jackman*, 48 F.3d at 6.

66. United States. v. Calhoun, 544 F.2d 291, 296-97 (6th Cir. 1976) (quoting Garrity v. New Jersey, 385 U.S. 493, 498 (1967))*; see also*, United States v. Dixon, 413 F.3d 540, 546 (6th Cir. 2005) (upholding the exclusion of ex-wife's identification testimony because "there were important areas of potential bias that could not be explored on cross-examination without bringing in highly prejudicial information concerning Dixon, such as his alleged spousal abuse and nonpayment of child support, and the effect of his actions on their daughter."). Sometimes the unfairly prejudicial information is solicited on direct. *See* Washington v. Jamison, 613 P.2d 776, 779 (Wash. 1980) ("[S]ince defendant did not take the stand, the counselors' testimony impermissibly disclosed defendant's prior criminal conduct when it was not in issue for any of the regularly accepted reasons").

67. *Jackman*, 48 F.3d at 6.

C. Helpfulness to the Jury

Another change from the historic approach is the more lenient "helpfulness" factor of Rule 701. "Under the common law, the standard for admitting opinions and conclusions was necessity."[68] Some early proposed versions of the opinion rule were similarly restrictive. Judge Weinstein has pointed out that when the District of Columbia Circuit Conference recommended the form of the rule found in Model Code of Evidence, "it would have substituted 'necessary' for 'helpful.'"[69] Similarly, he has noted that the Federal Rules Committee of the Federal Bar Association would have substituted "essential" for "helpful."[70]

Rule 701 again changed the focus, asking instead whether the lay opinion testimony is "helpful to the trier of fact in understanding a witness's testimony or in determining an issue of fact."[71] "The helpfulness requirement is interpreted liberally, as 'part of the modern trend to allow the admission of opinion testimony.'"[72] Even in states that have not adopted the Federal Rules, the practice of admitting opinions may turn on "expediency" or "convenience" rather than the common law requirement of "necessity."[73]

Several courts that addressed the use of lay opinion identification testimony examined Rule 701(b)'s requirement that the testimony be "helpful to clearly understanding the witness's testimony or to determining a fact in issue."[74] As Channick has discussed, the judiciary's concern is whether the testimony by the witness offer the opinion "amount[s] to little more than choosing up sides."[75] "Rule 701

68. BRODIN ET AL., *supra* note 22, § 701.03[1].

69. WEINSTEIN ET AL., *supra* note 49, § 701.02.

70. *Id*.

71. *Id*.

72. *Id*. § 701.03(3) (quoting Joy Mfg. Co. v. Sola Basic Indus, Inc., 697 F.2d 104 (3d Cir 1982)); *see also* BRODIN, *supra* note 22, at § 701.03[3] ("Rule 701 is part of modern trend admitting opinion testimony, provided it is well founded on personal observation and *is susceptible to specific cross-examination*.") (emphasis added).

73. BROUN, *supra* note 2, § 11, at 70.

74. FED. R. EVID. 701(b).

75. Channick, *supra* note 37, at 3472 (quoting FED. R. EVID. 701 advisory committee's note); *see also* 3 CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 7:5 (4th ed. June 2019) ("The helpfulness criterion implements the principle that a witness should testify to specific points and avoid broader generalizations or opinions on questions that the jury can resolve just as well by examining the same underlying material or evidence.") (citing United States v. Fulton, 837 F.3d 281, 295–300 (3d Cir. 2016)).

does not 'allow a witness to serve as the thirteenth juror' and make an identification by comparing two pieces of evidence that are already available to the jury."[76]

The general, oft-quoted rule is that a "witness's opinion concerning the identity of a person depicted in a surveillance photograph is admissible if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury."[77] While there is strong appeal in a more restrictive approach that would altogether prohibit the use of lay opinion testimony by law enforcement officers or witnesses who were not present during the incident, such an approach is inconsistent with the great weight of authority in state and federal courts that follow this rule.[78]

That said, more safeguards should be used, given the interference with effective cross-examination posed by lay opinion identification testimony. Another issue is that such testimony surreptitiously tends to bolster the video itself. A grainy, pixelated, or otherwise poor video might be of little help at all to a jury, but adding the lay witness may have the effect of encouraging jurors to see more in the video than they really can.[79] Courts can take a more balanced approach to lay opinion identification testimony that moderates its use beyond the factors predominantly focused on by the courts today, without overly limiting the testimony when it is helpful to the jury.

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76. BRODIN, *supra* note 22, § 701.03[2] (quoting United States v. Earls, 704 F.3d 466, 472–73 (7th Cir. 2012); *see also id.* § 701.03[3] ("Lay opinion does not assist the trier of fact" if the "evidence is clear and the trier of fact is perfectly capable of perceiving, understanding, and interpreting it."). This is one reason why some courts require that the video be grainy or that the defendant have changed their appearance between the relevant events and the time of trial. See the cases discussed *supra* in Section IV of this Article. *See* WIGMORE, *supra* note 24, § 1924:

> The second group of persons to whom the opinion rule has to be applied . . . includes those who concededly have *no greater skill* than the jury in drawing inferences from the kind of data in question. Such a witness' inferences are admissible when the jury can be put into a position of equal vantage for drawing them -in other words, when *by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion*.

77. United States v. Farnsworth, 729 F.2d 1158, 1160 (8th Cir. 1984). The testimony also should not bleed into narration*; see also* Fopma v. Commonwealth, No. 2002-SC-0802-MR, 2004 WL 1364197, at *3 (Ky. June 17, 2004); Morgan v. Commonwealth, 421 S.W.3d 388, 392 (Ky. 2014); Cuzick v. Commonwealth, 276 S.W.3d 260, 265-66 (Ky. 2009) ("[W]e have held he may not 'interpret' audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based upon the evidence.").

78. *See* BRENT G. FILBERT, ANNOTATION, ADMISSIBILITY OF LAY WITNESS INTERPRETATION OF SURVEILLANCE PHOTOGRAPH OR VIDEOTAPE, 74 A.L.R. 5th 652–53, 656, 660–61, 674 (2004); *see also infra* text accompanying notes 125–30.

79. Thanks to Yvonne Zylan for this point.

IV. JUDICIAL APPROACHES TO THE USE OF LAY OPINION TESTIMONY TO IDENTIFY INDIVIDUALS IN VIDEO-SURVEILLANCE RECORDINGS

Courts have been dealing with the issue of lay opinion identification testimony related to surveillance recordings since the mid-1970s.[80] Yet, there appears to be an increase in focus on the issue in recent years, particularly in the state courts, several of which are addressing the appropriate use of this testimony for the first time.[81] One of the most thorough recent state decisions analyzing the issue is the 2016 Illinois Supreme Court decision in *People v. Thompson*,[82] which held the admission of such testimony proper in some situations, but articulated a number of factors to use in determining admissibility and set forth certain procedural safeguards.[83] While the Illinois Supreme Court's opinion fails to adequately address all relevant concerns, it is an extremely helpful starting point and illustrates the issues nicely and comprehensively.

In *People v. Thompson*, Jeremy Thompson was convicted of violating the Illinois Methamphetamine Control and Community Protection Act.[84] He was accused of illegally procuring anhydrous ammonia with the intent of using the ammonia to manufacture methamphetamine.[85]

Prior to trial, Thompson filed a motion in limine to exclude lay opinion identification testimony of witnesses who would identify him in surveillance footage recorded on July 21, 2011 at the Hamson Ag farm, along with still photos from that footage.[86] Thompson argued that the "testimony went to an ultimate fact[87] and would

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80. *See, e.g.*, United States. v. Calhoun, 544 F.2d 291, 295 (6th Cir. 1976); United States v. Butcher, 557 F.2d 666, 667, 669 (9th Cir. 1977).

81. *See supra* note 5.

82. People v. Thompson, 49 N.E.3d 393, 402–03, 405 (Ill. 2016) *reh'g denied*.

83. *Id.* at 403–05.

84. *Id.* at 396.

85. *Id.* at 397.

86. *Id.*

87. Arguments that a witness's testimony touches upon an ultimate fact are, and should be, rejected under Fed. R. Evid. 704(a): "In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue." *See also* United States v. Crawford, 239 F.3d 1086, 1090 (9th Cir. 2001) (citing FED. R. EVID. 704) ("A lay witness may testify as to an ultimate issue of fact, so long as the testimony is otherwise admissible.") The driving force behind Rule 704(a) was to turn the focus to whether the testimony was helpful to the jury.

> The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective

invade the province of the jury."[88] The trial court denied the motion, relying on an earlier Illinois intermediate appellate court decision, *People v. Starks*,[89] and "conclud[ed] that the witnesses could provide identification testimony, as long as it was based upon their personal knowledge of defendant."[90]

At Thompson's trial, a deputy sheriff testified about his installation and maintenance of the surveillance camera at Hamson Ag farm.[91] He also testified to his retrieval of the video after the July 21, 2011 incident and described, based on his experience and training, how the subject in the video was attempting to steal anhydrous ammonia.[92] The deputy testified that he did not recognize the subject, but circulated the video and a color still image through the department and had the Chief Deputy distribute it to other counties and agencies.[93] The video was played for the jury after the deputy testified.[94]

The next witness was Chief Deputy William Sandusky of Hamilton County, Illinois, who testified that he "did not immediately recognize the subject in the video."[95] He recounted his interrogation of Thompson and was then permitted to testify, over objection, that the video "depicts Jeremy Thompson walking away from the anhydrous ammonia tanks, carrying . . . [what] appears to be a five-gallon bucket, as well as a soda bottle attached to a plastic hose."[96]

> and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

FED. R. EVID. 704 advisory committee's note to 1972 proposed rules 704. Illinois's rule is virtually identical to the federal rule. ILL. R. EVID. 704. Some state evidence codes have a less permissive form of Rule 704(a). *See, e.g.*, CONN. CODE EVID. § 7-3(a) (excluding *lay* opinion testimony that touches upon an ultimate issue); State v. Finan, 881 A.2d 187, 192 (Conn. 2005) ("[W]e conclude that the identification of the defendant as one of the perpetrators shown on the videotape was an ultimate issue in the case.").

88. *Thompson*, 49 N.E. 3d at 397.

89. People v. Starks, 456 N.E.2d 262, 264–66 (Ill. App. Ct. 1983). In *Starks*, two prison inmates were charged with damage to a correctional facility during a riot, when one of them tore a telephone conduit off the wall and the other passed it to other inmates. Surveying a handful of federal and state cases, the court found the lay opinion identification testimony by corrections officers admissible because the inmates were already incarcerated, so there was no additional prejudice manifested by the testimony, the officers were generally familiar with the defendants' appearances, and the defendants were in the background of the video-recording, making it more difficult for the jurors to see them in the video. *Id*.

90. *Thompson*, 49 N.E. 3d at 397.

91. *Id*.

92. *Id*. at 397–98.

93. *Id*. at 398.

94. *Id*.

95. *Id*.

96. *Id*.

An officer from the narcotics division in Mt. Vernon, Illinois, testified that he saw a still image circulated at his police department.[97] When asked, the officer testified that the image depicted Thompson carrying a bucket, hose, and soda bottle.[98] When asked if he recognized who was in the image when it was first shown to him, the officer testified that he did not, in part because the picture was black and white and had been "Xeroxed or faxed."[99] However, he then stated that once he viewed the video he was able to identify the subject as Thompson.[100] He also showed it to a woman named Jessica Joslin.[101]

Joslin then testified that an officer showed her the still image and that she believed it to depict a person named "Jeremy" that she saw sleeping on a front porch one time.[102] She had never met this person nor had a conversation with him but was permitted to identify him.[103]

Finally, another Mt. Vernon officer, Brian Huff, testified that he recognized the defendant after viewing the video footage because he "had previous dealings with him."[104]

The defense presented two alibi witnesses and rested.[105] The court instructed the jury and the jury retired at 3:15 p.m.[106] At 3:30 p.m., the jury asked to take a closer look at the video. They viewed it twice and returned to the jury room at 3:50 p.m.[107] Ten minutes later, they returned a guilty verdict.[108] The court sentenced Thompson as a habitual offender to eighteen years.[109] Thompson appealed to the intermediate court of appeals, the Illinois Appellate Court.[110]

The Appellate Court found the lay opinion identification testimony should not have been admitted because the lay opinions were not helpful to the jury and encroached upon their truth seeking and

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97. *Id* at 399.

98. *Id*.

99. *Id*.

100. *Id.*

101. *Id*.

102. *Id*.

103. *Id*. On cross-examination, she admitted that when she saw Jeremy she was strung out on methamphetamine. *Id*. Joslin was also impeached by cross-examination during which she admitted that her husband was currently incarcerated with pending charges "for various drug-related offenses and parole violations based on a tampering with anhydrous ammonia conviction." *Id.*

104. *Id*. at 399–400.

105. *Id*. at 400.

106. *Id*. at 401.

107. *Id*.

108. *Id*.

109. *Id*. at 401. Thompson was sentenced to eighteen years on one count and seven years on the second, the latter to run concurrently. *Id.*

110. *Id*.

credibility determination duties.[111] Specifically, the intermediate court concluded that none of the witnesses had a "better perspective than the jury to interpret the surveillance footage," and that there was no allegation that Thompson changed his appearance before trial, nor were the images unclear.[112] The Appellate Court found that even if the testimony was proper lay opinion identification testimony

> introduction of the evidence was prejudicial to defendant, rendered other evidence inconsequential, erased any reasonable doubt the jurors might otherwise have held, and, therefore, no confidence could be placed in the verdict specifically, that the jury reached its verdict on its *own* evaluation of the video.[113]

In reversing the intermediate court, the Illinois Supreme Court stated the general rule that lay opinion identification testimony is only helpful where "there is some basis for concluding that the witness is more likely to correctly identify the defendant . . . than is the jury."[114] Surveying state and federal cases, the court identified a number of factors relevant to whether a witness is more likely to identify the defendant correctly, applying a "totality of the circumstances" test:[115] 1) "the witness's general level of familiarity with the defendant's appearance";[116] 2) "the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or whether the defendant was dressed in a manner similar to the individual depicted";[117] 3) "whether the defendant disguised his appearance at the time of the

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111. *Id.*

112. *Id.* at 401–02. The Appellate Court also found that the identification testimony based on still images was of "questionable value because mannerisms and movements cannot be gleaned from a still image." *Id.*

113. *Id.* at 402 (citing People v. Thompson, 21 N.E.3d 1, 9–10 (Ill. App. Ct. 2014)).

114. *Id.* at 402 (quoting United States v. White, 639 F.3d 331, 336 (7th Cir. 2011).

115. *Id.* at 403.

116. *Id. Contra* United States v. Jackson, 688 F.2d 1121, 1123 (7th Cir. 1982) (upholding the admission of testimony of an identification witness who testified that she had met the defendant only one time at a Christmas party).

117. *Thompson*, 49 N.E.3d at 404; The Ninth Circuit writing:

> All of the contacts had ended four months prior to the robbery . . . . [T]here arises a question of whether the testimony improperly invaded the province of the jury. None of the police officers had any knowledge of the way the defendant looked at the time the robbery occurred. Consequently, their identifications were based solely upon their prior perceptions of the defendant. Because the defendant's appearance at the time of trial more closely resembled the individual depicted in the surveillance photographs than it resembled his appearance during the period the officers saw him, the determination of whether the defendant was the person in the photographs could perhaps have been made by the jury without the officers' testimony.

United States v. Butcher, 557 F.2d 666, 667–69 (9th Cir. 1977) (citation omitted).

offense";[118] 4) whether the defendant had altered his appearance prior to trial;[119] and 5) "the degree of clarity of the surveillance recording and the quality and completeness of the subject's depiction in the recording."[120] The Illinois Supreme Court stated that the existence of one or more of these factors provides "some basis for concluding that the witness is more likely to identify the defendant" than is the jury.[121] The court found it sufficient that the witness "only have had contact with the defendant, that the jury would not possess, to achieve a level of familiarity that renders the opinion helpful."[122] The court specifically rejected the requirement articulated by the intermediate appellate court in Starks that the witness must have had familiarity with the defendant before or at the time of the surveillance

118. *Thompson*, 49 N.E.3d at 404; *see also* United States v. Pierce, 136 F.3d 770, 775 (11th Cir. 1998) ("In view of the disguise worn by the robber pictured in the photograph and the level of familiarity with Pierce's appearance both [witnesses] possessed, however, we conclude that the lay opinion identification testimony admitted was 'helpful . . . to the determination of a fact in issue' within the meaning of Rule 701."); United States v. Robinson, 804 F.2d 280, 282 (4th Cir. 1986) ("Although the defendant's appearance may not have physically changed . . . until the time of trial, the individual in the photograph was wearing a hat and dark glasses, and the testimony of [] Robinson could be helpful to the jury on the issue of fact of whether the appellant was . . . in the . . . photographs."); United States v. Stormer, 938 F.2d 759, 762 (7th Cir. 1991) ("[T]here is evidence in the record that [Stormer] took measures to change his appearance during the robbery with the apparent motive of avoiding identification. Stormer wore a baseball cap which had the potential for obstructing a witness' view of his face and he had hosiery pulled over his face.").

119. *Thompson*, 49 N.E.3d at 404; *see also* United States v. Towns, 913 F.2d 434, 445 (7th Cir. 1990) ("Towns had a moustache at the time of the robbery that he had shaved off prior to trial. Moreover, the robber depicted in the photograph was wearing a stocking cap, sunglasses, and a sweatsuit that potentially made him appear heavier than he really was."); United States v. Borrelli, 621 F.2d 1092, 1095 (10th Cir. 1980) ("In the seven months between the robbery and trial, Borrelli had significantly altered his appearance by changing his hairstyle and growing a moustache, thereby making it difficult for the jury to compare his appearance in court with the appearance of the man in the bank surveillance photograph."). *Contra* United States v. Butcher, 557 F.2d 666, 669 (9th Cir. 1977) ("No evidence was submitted that the photographs did not clearly depict the robber, or that the defendant's appearance had so radically changed that additional identification evidence was necessary."); State v. Jamison, 613 P.2d 776, 779 (Wash. 1980) ("Here there was no evidence that, for example, the photographs failed to clearly or accurately depict the robber, or that defendant's appearance had changed or had been altered prior to trial or that he had certain peculiarities not readily comparable under trial conditions.").

120. *Thompson*, 49 N.E.3d at 404; *see, e.g.*, United States v. Kornegay, 410 F.3d 89, 95 (1st Cir. 2005) ("The videotape of the drug deal was blurry and showed the seller's face for only a few seconds. Thus, it would have been difficult for the jury to attempt to match the photograph of Kornegay with the person in the videotape.").

121. *Thompson*, 49 N.E.3d at 405 (quoting State v. Barnes, 212 P.3d 1017, 1024 (Idaho App. 2009)).

122. *Id*.

recording.[123] The court concluded that "the jury is free to reject or disregard such testimony and reach its own conclusion regarding who is depicted in the surveillance recording."[124]

The court then conceded that lay opinion identification testimony could be excluded under Rule 403.[125] It rejected, however, Thompson's argument relying on *United States v. Calhoun*[126] that law enforcement should be prohibited from providing lay opinion testimony as a violation of the Sixth Amendment right to confrontation.[127] The court noted that argument had been rejected by the overwhelming majority of federal courts, which relied primarily upon *Delaware v. Van Arsdall*.[128] In *Van Arsdall*, the U.S. Supreme Court held that confrontation clause violations arise when a trial court *prohibits* "otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness."[129] However, the majority of federal courts have distinguished a court-imposed prohibition from a "tactical decision" made by defense counsel.[130]

The Illinois Supreme Court concluded that certain procedural safeguards should be employed by trial courts determining whether to admit lay opinion identification testimony.[131] Relying on *United States v. Allen*,[132] the court ruled that the defendant should be permitted to object and cross-examine on the foundation of the law

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123. *Id; see also* Johnson v. State, 252 So.3d 1114, 1118 (Fla. 2018) ("[A]llowing voice identification testimony that was acquired during an ongoing investigation is consistent with aiding the jury instead of invading the province of the jury…."). The court in *Thompson* also specifically rejected the requirement that either the defendant's appearance must have changed at trial or that the recording lacked clarity. *Thompson*, 49 N.E.3d at 405.

124. *Thompson*, 49 N.E.3d at 406. In an unpublished opinion, the Supreme Court of Kentucky was similarly unbothered by identification testimony that even included some brief comments describing events in the video: "These brief comments were not so excessive as to invade the province of the jury in the interpretation of the surveillance video." Fopma v. Commonwealth, No. 2002-SC-0802-MR, 2004 WL 1364197, at *3 (Ky. June 17, 2004).

125. *Thompson,* 49 N.E.3d at 406.

126. 544 F.2d 291 (6th Cir. 1976).

127. The Court of Appeals in Calhoun did not actually reach that argument as noted by the Eighth Circuit in *United States v. Farnsworth*, 729 F.2d 1158, 1161 (8th Cir. 1984).

128. Delaware v. Van Arsdall, 475 U.S. 673 (1986).

129. *Id*. at 680.

130. *Thompson*, 49 N.E.3d at 406; *see also* United States v. Wright, 904 F.2d 403, 406 (8th Cir. 1990) ("Wright's decision not to cross-examine the six witnesses for bias was a tactical decision made by his attorney."); United States v. Contreras, 536 F.3d 1167, 1172 (10th Cir. 2008) ("Contreras also could have elected to fully cross-examine Ferguson without concern about testimony regarding her role as Contreras's probation officer. Instead, Contreras elected, as a tactical matter, to decline to cross-examine Ferguson. We cannot conclude that this tactical decision resulted in unfair prejudice.")

131. *Thompson*, 49 N.E.3d at 407.

132. United States v. Allen 787 F.2d 933, 937 (4th Cir. 1986), *vacated on other grounds*, 479 U.S. 1077 (1987).

enforcement officer's testimony outside the presence of the jury.[133] This would allow the trial court "to render a more informed decision as to whether the probative value of the testimony is substantially outweighed by the danger of unfair prejudice."[134] However, despite the fact that in *Allen*, the U.S. Court of Appeals instructed the prosecution "not to reveal the occupation of the witness,"[135] the Illinois Supreme Court found that doing so was permissible, provided that the testimony about the relationship with the defendant "should consist only of how long he knew the defendant and how frequently he saw him or her."[136]

Finally, the Illinois Supreme Court held that the trial court should instruct the jury that it "need not give any weight at all to such testimony and also that the jury is not to draw any adverse inference from the fact that the witness is a law enforcement officer if that fact is disclosed."[137]

The Supreme Court then applied those principles to Mr. Thompson's appeal.[138] Despite the fact that the video was clear and that there was no evidence that Chief Deputy Sandusky was generally familiar with Thompson, the court, in one of the most lenient approaches to lay opinion identification testimony, found it sufficient that Sandusky gained a familiarity with him during his interrogation of him.[139] Although a short interview, the court found that "Sandusky interacted with defendant in a more natural setting" than the perspective the jury would only have from the courtroom.[140]

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133. *Thompson*, 49 N.E.3d at 407 (citing *Allen*, 787 F.2d at 937–98). The Seventh Circuit reasoned similarly:

> Thus, outside of the presence of the jury, the trial judge heard testimony establishing the foundation for the identification testimony. The trial judge was also presented with evidence that permitted him to assess the bias and prejudice of the witnesses. Finally, this examination afforded the trial judge the opportunity to balance the probative value of the identification testimony against the danger of prejudice to the defendant before making his ruling on the admissibility of the testimony.

United States v. Stormer, 938 F.2d 759, 763–64 (7th Cir. 1991).

134. *Thompson,* 49 N.E.3d at 407.

135. *Id*.

136. *Id.*

137. *Id*. (citing United States v. Henderson, 68 F.3d 323, 328 (9th Cir. 1995)) ("The court also instructed the jury that it 'should not draw any adverse inference from the fact McMillan is a police officer.'").

138. *Thompson*, 49 N.E.3d at 407–09.

139. *Id*. at 408.

140. *Id.*

However, because the trial court did not engage in the above-referenced "precautionary procedures required for law enforcement witnesses," it found the testimony inadmissible.[141]

As for Mt. Vernon Officer Jackson's testimony, the court found problematic the lack of a record about how long he knew Thompson, how many times he had seen him, and under what conditions or circumstances.[142] For these reasons and given the lack of precautionary procedures, the court found the testimony inadmissible.[143] The court believed the admissibility of Jessica Joslin's testimony to be a close call, but concluded her testimony contained some basis for determining that she was more likely to correctly identify the defendant than the jury and that the precautionary procedures did not apply to witnesses who were not law enforcement.[144] The court decided that Officer Huff's testimony that he knew Thompson from "previous dealings" was enough to "clearly" demonstrate that he had a perspective the jury did not have.[145] However, because the precautionary safeguards were not undertaken with Huff, the court found the admission of the testimony error.[146]

The court ultimately held the admission of the law enforcement officers' testimony harmless, because of Thompson's confession.[147] It found it significant that both the prosecutor and defense counsel, as well as the trial court, instructed the jury that it was up to them to make the determination regarding the identity of the individual in the video.[148] Finally, the court noted that the jury viewed the video twice during deliberations.[149]

While the Illinois Supreme Court took a step in the right direction by summarizing the factors trial courts should review and by requiring procedural safeguards, these protections are not sufficient. Specifically, they do not adequately remedy the concern that effective cross-examination might be unfairly limited, for example, by the nature of the relationship between a criminal defendant and a law enforcement witness. In this context, the defense attorney's decision not to cross-examine fully is not a tactical choice; rather, it is the only choice—tantamount to *no* choice. Again, effective cross-examination is the primary check on the more liberal use of lay opinion testimony

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 408–09
146. *Id.*
147. *Id.* at 409.
148. *Id.*
149. *Id.*

provide for by Rule 701 and its state analogs.[150] The safeguards also fail to adequately address the concerns that arise by the very fact that a law enforcement officer is testifying about a relationship with the individual to be identified.[151]

In the past three years, several other state appellate courts have condoned the use of such testimony for the first time. In 2017, in a case of first impression, the New Mexico Court of Appeals followed *Thompson* and condoned the use of such testimony in *State v. Sweat*.[152] Alree Sweat was convicted of four counts of automobile burglary.[153] On appeal, he challenged the admission of lay opinion identification testimony, identifying him in "grainy" surveillance video footage.[154] A detective had testified that he knew the defendant before the incident that was recorded and recognized him in the surveillance video.[155] He testified that he had had "countless interactions" with the defendant.[156] He also testified that the defendant's appearance had changed in the year between the incident and the time of trial.[157]

In objecting to the admissibility of the video itself, Sweat complained that it had little probative value because the footage was so unclear.[158] In response, the court noted that the video was relevant in part because "showing the pictured person's body type and gait" was "information from which a person familiar with the person pictured could make an identification."[159]

In response to Sweat's argument regarding the admissibility of the detective's lay opinion testimony, the court discussed the holding and factors articulated by the Illinois court in *Thompson*, and then adopted its analysis.[160] Applying the *Thompson* factors and finding the video grainy, that the detective had countless interactions with Sweat previously, and that Sweat had changed his appearance, the court

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150. *See supra* text accompanying notes 36, 58, 59.

151. They also do not address the concerns that typically arise with eyewitness identification generally, a topic that is outside the scope of this article. *See supra* note 32; *infra* note 210. Similar issues arise in the context of "earwitness" identification. *See* United States v. Gholikan, 370 F. App'x 987, 991 (11th Cir. 2010); Johnson v. State, 252 So. 3d 1114, 1115 (Fla. 2018); Cindy E. Laub et al., *Can the Courts Tell an Ear from an Eye? Legal Approaches to Voice Identification Evidence*, 37 LAW & PSYCHOL. REV. 1119 (2013).

152. State v. Sweat, 404 P.3d 20, 27 (N.M. 2017).

153. *Id*. at 22.

154. *Id*. at 22.

155. *Id.* at 24.

156. *Id.* at 27.

157. *Id.* The defendant did not object to the questioning, thus it was reviewed for plain error. *Id.* at 26.

158. *Id*. at 24.

159. *Id.* at 25.

160. *Id*. at 26–27.

found admission of the lay opinion testimony did not constitute plain error.[161] Sweat did not argue that he failed to receive proper "precautionary procedures" like those discussed in *Thompson*.[162]

New Mexico re-affirmed its approach in *State v. Gwynne*, a case involving manufacture of child pornography.[163] Relying on *Sweat*, the court upheld admission of a detective's lay opinion identification testimony comparing photographs of the defendant's torso and genitals with that of the male figure in the video.[164] Again, the court emphasized the poor quality of the video (noting that the defendant, in fact, had argued that point).[165] This fairly permissive approach is contrary to decisions that have held that familiarity through photos may be insufficient.[166]

In 2017, the Supreme Court of Georgia addressed the issue of lay opinion identification testimony for the first time in *Glenn v. State*.[167] The trial court admitted the testimony of an ex-girlfriend and acquaintance that the defendant was the subject in the motel surveillance video.[168] The court briefly addressed the issue:

> Indeed, in most cases, the opportunity to observe a person's mannerisms, gait, and similar characteristics depicted in video footage will increase the likelihood that a lay witness familiar with a defendant will be better equipped than jurors to identify the defendant from such images.[169]

Echoing the factors articulated in *Thompson*, the court noted the poor quality of video, the fact that the witnesses had known the defendant, and the fact that the defendant's appearance had changed.[170]

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161. *Id.* at 28.

162. *Id.* at 27.

163. State v, Gwynne, 417 P.3d 1157, 1170 (N.M. 2018).

164. *Id.* at 1169–70.

165. *Id.*

166. *See* United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993), *amended by* 998 F.2d 1460 (9th Cir. 1993) ("Miller not only did not know LaPierre, he had never even seen him in person. Miller's knowledge of LaPierre's appearance was based entirely on his review of photographs of LaPierre and witnesses' descriptions of him. We can perhaps imagine a hypothetical scenario in which a witness who knew a defendant only through photographs nonetheless had become sufficiently familiar with his appearance to give lay opinion testimony of this sort. But this is not such a case."); *see also* United States v. Pierce, 136 F.3d 770, 774 (11th Cir. 1998) ("Perhaps most critical to this determination is the witness's level of familiarity with the defendant's appearance.").

167. Glenn v. State, 806 S.E.2d 564, 568–69 (Ga. 2017).

168. *Id.* at 569.

169. *Id.*

170. *Id.*

The Supreme Court of Mississippi addressed the issue for the first time in *Lenoir v. State*.[171] Lenoir was charged with armed robbery of a Dollar General store.[172] Two witnesses who were relatives of the defendant's ex-girlfriend were allowed to testify and identify him in the surveillance video.[173] Following an opinion of the Mississippi Court of Appeals, *Bennett v. State*,[174] which in turn relied heavily on the First Circuit's opinion in *United States v. Jackman*,[175] the Mississippi Supreme Court in *Lenoir* found the testimony admissible.[176]

> In *Jackman*, the First Circuit "concluded that [opinion identification] evidence ought to be admitted in any circumstance where it can be demonstrated that the witness has a greater familiarity with the defendant's appearance than the jury could possess and the recorded likeness is not either (a) so unmistakably clear, or (b) so hopelessly obscured, that the witness is no better suited than the jury to draw a meaningful conclusion as to the identity of the person depicted.[177]

Lenoir also challenged the witnesses' familiarity, arguing that it did not rise to the level of familiarity possessed by the mother of the defendant in *Bennett*.[178] In rejecting the argument, the Mississippi Supreme Court stated:

> [W]e find the level of familiarity with Lenoir goes to the *weight* and *credibility* of their opinion testimony, not its admissibility. Rule 701 requires lay opinion testimony to be "rationally based on the perception of the witness." And both Butler and Mathis testified their opinions were grounded in their observation of how Lenoir walked.[179]

Although in the past it had rejected the use of lay opinion identification testimony,[180] in 2018, the North Carolina Court of Appeals found lay opinion identification testimony by a police officer admissible in a case involving a felon in possession of a firearm in *State v. Weldon*.[181] At issue was lay opinion identification testimony related

171. Lenoir v. State, 222 So. 3d 273, 276 (Miss. 2017).

172. *Id.* at 275.

173. *Id.*

174. Bennett v. State, 757 So. 2d 1074, 1076 (Miss. Ct. App. 2000). Bennett involved testimony by a mother identifying her son in a surveillance video. *Id.* at 1075.

175. United States v. Jackman, 48 F.3d 1, 4–5 (1st Cir. 1995).

176. *Lenoir*, 222 So. 3d at 276–78.

177. *Id.* at 276 (quoting *Bennett*, 757 So.2d at 1076).

178. *Id.* at 277.

179. *Id.* (internal citations omitted).

180. *See* State v. Belk, 414, 689 S.E.2d 439, 441 (N.C. Ct. App. 2009).

181. State v. Weldon, 811 S.E.2d 683, 686 (N.C. Ct. App. 2018).

to storefront surveillance video that recorded the incident.[182] Weldon did not challenge lay opinion identification testimony given by an officer who knew him well and a store owner who had seen him the day of the incident.[183] However, he did challenge testimony given by another officer, Williams, who identified him despite never having any direct contact with Weldon.[184]

> Officer Williams testified that he was familiar with defendant's identity because defendant had been pointed out to him on numerous occasions due to defendant's "reputation" in the area, and that he had observed defendant "very frequently" in the area for "at least a good two months" before defendant was shot on 23 March 2015. The day after defendant was shot, Officer Williams saw defendant coming out of a house that he was surveilling. Officer Williams stated that he was able to identify that individual as defendant because he "recognized his face," and because he had a brace on his leg and "was limping pretty bad."[185]

The North Carolina Court of Appeals related the factors deemed relevant under its precedent:

> (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance [video] was taken or when the defendant was dressed in a manner similar to the individual depicted in the [video]; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.[186]

The court added that "'[l]ay opinion identification testimony is more likely to be admissible where the surveillance [video] . . . shows only a partial view of the subject.'"[187] It then held that, because Officer Williams was sufficiently familiar with defendant's appearance, and because defendant had altered that appearance by the time of his trial, it was not an abuse of discretion to admit the testimony.[188]

As these cases demonstrate, most courts follow factors that are similar to those set forth in *Thompson*.[189] While a majority of courts

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182. *Id.*

183. *Id.* at 687–89.

184. *Id.* at 687.

185. *Id.* at 688.

186. *Id.* (quoting *Belk*, 689 S.E.2d at 441).

187. *Weldon*, 811 S.E.2d at 688 (quoting *Belk*, 689 S.E.2d at 442).

188. *Id.* at 689.

189. *See, e.g.*, People v. Brown, 82 N.E.3d 148, 167–68 (Ill. App. Ct. 2017). The court writing:

have found the lay opinion identification testimony admissible, some courts have rejected the testimony if there was no basis for finding it helpful to the jury.[190]

A few courts have emphasized the problems caused by the failure to enable effective cross-examination. In what is oft-cited by defendants as the most restrictive approach, the Sixth Circuit in *United States v. Calhoun* reviewed a challenge to the admission of lay opinion identification testimony by defendant's parole officer, who identified the defendant in a bank surveillance photograph.[191] The Sixth Circuit highlighted the problems undermining effective cross-examination:

> The record, however, does not indicate that Detective Hill had any familiarity with defendant beyond the eyewitness descriptions of what the shooter wore, eyewitness statements that defendant was the shooter, and a photograph of defendant from police computer files. Nothing in the record indicates how long Detective Hill reviewed the recording in order to discern defendant. The record also fails to show that Detective Hill had any familiarity with the victim. Consequently, we find the record does not demonstrate a basis that might lead one to conclude Detective Hill was more likely to correctly identify defendant and the victim in the recording than the jury. Furthermore, Detective Hill provided his identification testimony without the trial court first engaging in precautionary procedures to safeguard defendant's right to confrontation.

Id.; United States v. Allen, 787 F.2d 933, 936 (4th Cir. 1986) ("This fuller perspective is especially helpful where, as here, the photographs used for identification are less than clear."), *vacated on other grounds*, 479 U.S. 1077 (1987); Nooner v. State, 907 S.W.2d 677, 685 (Ark. 1995) ("The videotape and surveillance photographs are not crystal clear for identification purposes but are somewhat blurred and indistinct. Hence, any testimony from people who had a special familiarity with the suspect would qualify as an aid to the jury."). *See generally* FILBERT, *supra note* 78.

190. *See, e.g.*, Commonwealth v. Vacher, 14 N.E.3d 264, 279 (Mass. 2014) ("Here, there is no indication that the detective possessed any special familiarity with the defendant that the jury lacked, or that the defendant's appearance had changed since the time the footage was taken, such that the jury needed assistance in identifying the individual depicted."). Justification for finding the testimony "helpful" can be remarkably broad. *See, e.g.*, United States v. Jackson, 688 F.2d 1121, 1125 (7th Cir. 1982) ("[T]estimony was useful to the jury . . . because it is based upon Ms. Heneghan's opportunity to compare the person in the bank surveillance photograph with every person she had ever met, whereas the jury could only compare the person in the surveillance photographs to the defendant."); United States v. Zepeda-Lopez, 478 F.3d 1213, 1222 (10th Cir. 2007) ("Agent Barrett testified that he had looked at the video "many times" in forming his opinion that Mr. Zepeda-Lopez's image appeared on it. The record reflects that during a voir dire examination, defense counsel asked Agent Barrett if he had "looked at this video many times[.]" Agent Barrett responded, "Yes[.]" The jury did not have the same opportunity to do so. Thus, Agent Barrett's testimony was helpful to it in deciding whether Mr. Zepeda-Lopez appeared on the portion of the video tape played before the jury."); United States v. Begay, 42 F.3d 486, 503 (9th Cir. 1994) ("Although the jury viewed Exhibit 1 in its entirety, it is reasonable to assume that one viewing a videotape of a demonstration involving over 200 people would likely not see certain details, given the tremendous array of events all occurring simultaneously. Officer Calnimptewa spent over 100 hours viewing Exhibit 1. To have the jury do likewise would be an extremely inefficient use of the jury's and the court's time.").

191. United States v. Calhoun, 544 F.2d 291 (6th Cir. 1976).

> [T]he main defect in permitting Snyder to testify was that his broad assertion could not be tempered or probed by cross-examination. The defendant could not explore the possible motives his parole officer might harbor in positively identifying him as the robber.[192]

Questioning whether the testimony was helpful to the jury, the Court of Appeals emphasized that its construction of Rule 701 was fortified by Rule 403, that is, that the probative value was substantially outweighed by the danger of unfair prejudice.[193]

Florida courts also appear to have taken a more restrictive approach to lay opinion identification testimony. Like Channick and Osentoski, the Florida courts prefer that a law enforcement officer actually have witnessed the event at issue.[194] As the Florida appellate court in *Ruffin v. State* noted:

> When factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury. … [The three officers] were not eyewitnesses to the crime, they did not have any special familiarity with Ruffin, and they were not qualified as any type of experts in identification.[195]

Although the more restrictive approaches certainly address the primary concerns with lay opinion identification testimony, as noted, they have been consistently rejected by the majority of jurisdictions, even by courts who have discouraged the use of such testimony. Accordingly, the establishment of a middle ground that permits the testimony when it is helpful to the jurors, but also moderates its use in a way that is more consistent with the history and reasoning

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192. *Id.* at 295.

193. *Id.* at 295–96. The opinion also examined whether the error was harmless and discussed whether the defendant voluntarily waived his fundamental right to cross-examination. *Id.* at 296–97. While not necessary to the rule-based analysis of this article, the U.S. Supreme Court has stated that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985). *Fensterer* and Delaware v. Van Arsdall, have led courts to conclude that the lack of an ability to engage in cross-examination of a witness offering lay opinion identification testimony does not rise to the level of a constitutional violation, because there is a confrontation clause issue only if the court *prohibits* cross-examination. 475 U.S. 673, 679 (1986).

194. Ruffin v. State, 549 So. 2d 250, 251 (Fla. 5th DCA 1989); Charles v. State, 79 So. 3d 233, 235 (Fla. 4th DCA 2012) ("As in *Ruffin*, the testifying officer in this case was not an eyewitness to the use of the credit card at the gas station, he had no special familiarity with appellant, and he was not otherwise qualified as an expert in video identification."). But in *Johnson v. State*, 93 So. 3d 1066, 1069 (Fla. 4th DCA 2012), the Florida court distinguished earlier decisions: "[T]here was not the danger that the detective's knowledge of Johnson came from criminal conduct unrelated to the case; she was one of the officers present for the Alabama arrest, a matter properly before the jury."

195. Ruffin, 549 So. 2d 250, 251.

behind Rule 701, is necessary to in order to curb abuses caused by the current use of lay opinion identification testimony regarding video surveillance.

V. ADDITIONAL SAFEGUARDS MODERATING THE USE OF LAY OPINION IDENTIFICATION TESTIMONY

In addition to the factors and precautionary measures summarized by the Illinois Supreme Court in *Thompson*, additional safeguards are warranted. Such safeguards should take into account the needs of prosecution and the importance of assisting the jury in its fact-finding role, while balancing the articulated concerns that come with the use of this lay opinion testimony. Some possibilities include: A) law enforcement identification testimony should be permitted only when there is no alternative evidence; B) testimony on the relationship between a criminal defendant and the law enforcement witness should be prohibited; C) the number of testifying law enforcement officers should be limited; D) the jury should be instructed that the testimony is mere opinion and that it should consider the witness's relationship to the proffering party; and E) the witness's familiarity with the witness must have been acquired before the incident at issue. These safeguards can either be viewed as factors in deciding whether the testimony is "helpful" to the jury in determining a fact in issue, or as an application of Rule 403.[196]

A. Law Enforcement Lay Opinion Identification Testimony Should be Permitted Only When There is no Alternative Evidence

Law enforcement witnesses present unique problems. Because of the inherent problems with effective cross-examination that arise when a law enforcement officer offers lay opinion identification testimony, it should be a last resort. As the Ninth Circuit stated: "Because of the constraints on cross-examination, however, we do not encourage the use of lay opinion identification by police or parole officers. They should be used only when no other adequate identification testimony is available to the prosecution."[197] When there are alternatives methods of providing identification, the

196. *See* FED. R EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); *see also* United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993), *amended by* 998 F.2d 1460 (9th Cir. 1993) ("Miller's testimony therefore ran the risk of invading the province of the jury and unfairly prejudicing LaPierre."); BRODIN, *supra* note 22, §§ 701.03[1], 701.04.

197. United States v. Farnsworth, 729 F.2d 1158, 1161 (8th Cir. 1984) (citing United States v. Butcher, 557 F.2d 666, 670 (9th Cir. 1977)).

probative value of the law enforcement officer's identification opinion testimony is substantially outweighed by the danger of unfair prejudice.[198] For this reason, law enforcement lay opinion identification testimony identifying a defendant in surveillance video should only be permitted when there is no alternative.

B. Testimony About the Relationship Between a Criminal Defendant and a Law Enforcement Officer or Other Prejudicial Relationship Should be Prohibited

Although the Illinois Supreme Court discussed the issue of the relationship between the defendant and the witness in *Thompson*, it did not set essential safeguards on the use of law enforcement lay opinion identification testimony. It should have. There are a number of ways around having a law enforcement officer identify their professional role and their relationship to a defendant.[199] For example, a law enforcement officer could simply state that they have a "professional" relationship with the defendant,[200] or that they are

198. *See* United States v. Henderson, 68 F.3d 323, 328 (9th Cir. 1995). The court found:

> On the first count, there was no other identification testimony identifying Henderson as the robber depicted in the surveillance photographs, or otherwise identifying him as the bank robber. As a result, McMillan's identification of Henderson as the robber depicted in the surveillance photographs was highly probative. . . . On the third count, however, there were two eyewitnesses who identified Henderson as the robber. In this circumstance, the prejudicial effect of McMillan's opinion testimony substantially outweighed its probative value. Admitting McMillan's testimony violated Federal Rule of Evidence 403.

Id.

199. *See* United States v. Stormer, 938 F.2d 759, 764 (7th Cir. 1991) ("[T]he district court took the additional precautions of ordering the government not to disclose the occupation of the two officers who did not participate in the robbery investigation…."); *Farnsworth*, 729 F.2d at 1161 ("The court directed the government not to delve into the circumstances of the parole officers' relationships with the defendant. On direct examination, the government brought out only the number of times each witness had seen the defendant and the duration of those visits."); United States v. Kornegay, 410 F.3d 89, 96 (1st Cir. 2005). The court noted:

> Through the use of leading questions, Perkins testified that he was a police officer but did not specify his duties or responsibilities. He told the jury that he encountered the Kornegays as part of the Boston Police Department's community policing program, which encourages officers to become familiar with the individuals who live in their assigned neighborhood beats. He also told the jury that the encounters in the summer of 2001 were not arrests and did not involve allegations of criminal activity.

Id.

200. *See* United States v. Beck, 418 F.3d 1008, 1013 (9th Cir. 2005) (noting that the probation officer testified only that he had a "professional relationship" with defendant).

a "state employee."[201] The witness could then identify the number of times and length of time during which the two have interacted without divulging more details about the relationship.[202]

C. The Trial Court Should Limit the Number of Law Enforcement Officers Who Can Testify

In the event that law enforcement officers must be used to provide lay opinion identification testimony, a trial court should limit the number of officers who provide such testimony. Consider the war of attrition waged against defendant in *State v. Finan*, in which "there was no physical evidence linking the defendant to the robbery."[203]

> Of the six witnesses who did identify the defendant as one of the robbers, four of them were the officers. . . . The fifth was the store clerk who saw the robbers for some number of seconds but less than one minute and who told the police shortly after the robbery that he could not identify the robbers….. . . [T]he sixth witness, who claimed that the defendant had admitted having participated in the robbery to him, was impeached by the fact that he had two felony charges pending against him in another jurisdiction. Several witnesses who were called on the defendant's behalf testified that [the sixth witness] did not have a good reputation for truthfulness.[204]

As the Supreme Court of Connecticut in *Finan* noted, "the improper admission of the police officers' testimony likely affected the verdict and undermined confidence in the fairness of the verdict."[205] Given the adverse effect that such testimony may have on the jury, the interference with effective cross-examination, and the more limited

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201. *See Butcher*, 557 F.2d at 667 (defendant's parole officer was merely described as a state employee). This specific limitation would not apply if the law enforcement officer possessed some *other* basis for revealing the relationship, such as where the officer was the *arresting* officer. However, the other safeguards would still apply to the lay opinion identification testimony. Many thanks to Professor Velte for raising this point.

202. *See Farnsworth*, 729 F.2d at 1161; *see also* United States v. Sostarich, 684 F.2d 606, 608 (8th Cir. 1982) ("It is clear, however, the government did not need to bring out the fact of incarceration to prove that Dahm knew Sostarich well at the time they were in Englewood; instead, the government could have asked whether Dahm previously had lived or worked with Sostarich.").

203. State v. Finan, 881 A.2d 187, 194 (Conn. 2005).

204. *Id.* (quoting State v. Finan, 843 A.2d 630 (Conn. 2004) (Flynn, J., dissenting) *rev'd*, 881 A.2d 187 (Conn. 2005).

205. *Id.*

probative value such repetitive testimony has,[206] the trial courts should limit the number of law enforcement officers providing such testimony.

D. The Trial Court Should Issue an Instruction to the Jury that the Testimony is Opinion Testimony Only and that it Should Consider the Witness's Relationship to the Proffering Party

Courts should routinely issue instructions that the lay opinion identification testimony is only the witness's opinion, emphasizing that the jury should make up its own mind.[207] Courts should specifically instruct the jury that, "[i]n weighing the testimony of the witnesses you should consider their relationship to the government or the defendant; their interest, if any, in the outcome of the case."[208]

E. Familiarity With the Subject of the Surveillance Video Should be Acquired Prior to the Litigation

The Illinois Supreme Court in *Thompson* rejected a requirement that the witness's familiarity should have been established before the incident that gave rise to the pending case.[209] However, maintaining such a requirement decreases the possibility that a witness is—consciously or subconsciously—slanting their testimony in favor of identifying a specific party (such as a criminal defendant) in the

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206. *See* FED. R. EVID. 403 advisory committee's notes to 1972 proposed rules 403 ("The availability of other means of proof may also be an appropriate factor."); *see also* Old Chief v. United States, 519 U.S. 172, 184-85 (1997) ("[T]he notes leave no question that when Rule 403 confers discretion by providing that evidence 'may' be excluded, the discretionary judgment may be informed . . . by placing the result of that assessment alongside similar assessments of evidentiary alternatives.").

207. *See* People v. Brown, 46 N.Y.S.3d 317, 318 (N.Y. 2016) ("We note that the court properly instructed the jury that the officers merely provided their opinions that defendant was depicted in the videos and that the jurors were the ultimate finders of fact on the issue of the identity of the perpetrators."); United States v. Henderson, 68 F.3d 323, 328 (9th Cir. 1995) ("[T]he court told the jury McMillan's identification of Henderson as the person shown robbing the banks was simply an opinion and if it did 'not assist you, then you need not give it any weight at all.'"); United States v. Stormer, 938 F.2d 759, 760 (7th Cir. 1991) ("At trial, the judge gave a preliminary instruction and a limiting instruction to the jury regarding the weight to be given the opinion testimony of the police officers."); *see, e.g.*, S1 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL, OPINION EVIDENCE (LAY WITNESSES) (F.R.E. 701) 2.10 (2019). This is similar to, but requires more, than the *Thompson* court's requirement that a jury "need not give any weight at all to such testimony." People v. Thompson, 49 N.E.3d 393, 407 (Ill. 2016).

208. United States v. Zepeda-Lopez, 478 F.3d 1213, 1222 (10th Cir. 2007).

209. *Thompson*, 49 N.E.3d at 405 ("[A] witness need not have familiarity with the defendant before or at the time of the recording to testify…."); *see also* United States v. Suleitopa, 719 F. App'x 233, 235 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 248 (2018) ("Suleitopa has not disputed the Government's assertion that agent Van Wie was personally aware of what he looked like after having been present at his pre-trial initial appearance, arraignment, and motions hearings.").

surveillance video.[210] Such a limitation is not unknown to evidence law. Federal Rule of Evidence 901(b)(2) includes such a requirement when authenticating a document through lay opinion testimony.

> Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, *based on a familiarity with it that was not acquired for the current litigation*.[211]

The advisory committee's note explains that "[t]estimony based upon familiarity acquired for purposes of the litigation is reserved to the expert . . . ."[212]

The same approach should be used under Rule 701. Maintaining this requirement will ensure that the lay opinion testimony is actually helpful to the jury and is not merely "choosing up sides."[213] As the Fourth Circuit explained in *United States v. Allen*, lay opinion identification testimony is most helpful when the "witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance."[214] There is nothing "natural" about pre-trial or investigative interactions. The familiarity should have been established before in a truly natural environment.

VI. CONCLUSION

Living in a surveillance society comes with various challenges that implicate civil liberties ranging from privacy to due process. Undermining effective advocacy at trial should not be an additional complication of this societal choice.

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210. Indeed, having an officer testify based on familiarity with a subject gleaned only during an investigation is light years away from the double-blind eyewitness identification best practice where neither the identifier nor the person conducting the identification know who the suspect is. *See, e.g.*, Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 391 (2016):

> [R]esearchers almost universally agree that double-blind testing is the most fundamental of all of the reforms, and the recent report of [the National Academy of Science] identified it as one of the core reforms that is scientifically valid and settled. . . . This recommendation is not based upon any doubts about police integrity; rather, it is based on the well-accepted understanding that people are influenced by their own beliefs, and that they can unknowingly leak information, which can influence the subject's responses on the tests and the administrator's interpretations of the results.

Id. at 391.

211. FED. R. EVID. 901(b)(2) (emphasis added).

212. FED. R. EVID. 901 advisory committee's note to 1972 proposed rules.

213. FED. R. EVID. 701 advisory committee's note to 1972 proposed rules.

214. United States v. Allen, 787 F.2d 933, 936 (4th Cir. 1986), *vacated on other grounds*, 479 U.S. 1077 (1987).

That said, while surveillance video may sometimes adequately "speak for itself"[215] at trial, sometimes it may not. Witnesses can offer lay opinion identification testimony that can help a jury do justice. Yet the factors and safeguards relied upon by most courts today are insufficient to protect against unfair prejudice and the undermining of effective cross-examination. Given that the majority of courts have been loath to reject the testimony altogether, we should do more to moderate the use of lay opinion identification testimony.

Accordingly, like all rules of evidence, Rules 701 and 403 "should be construed so as to administer every proceeding fairly . . . and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[216] In addition to the factors and safeguards presently utilized, the best way to apply those rules in the context of lay opinion identification testimony is to: a) permit law enforcement witnesses to provide the opinion only when there is no alternative evidence; b) prohibit prejudicial testimony on the nature of the witness's relationship to a party; c) limit the number of law enforcement personnel who provide lay opinion identification testimony; d) instruct the jury that the witness's testimony is just an opinion and that it should consider the witness's relationship to the proffering party; and e) require that the witness acquire their familiarity with the subject of the video prior to the litigation.

While this approach will not eliminate all risk of unfair prejudice nor all danger of undermining effective cross-examination, it will curb excessive use of lay opinion identification testimony, while still permitting its use when helpful to the jury in determining a fact in issue.

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215. *See supra* note 2.

216. FED. R. EVID. 102.